IN THE

Supreme Court of the United States

October Term, 1974

No. 74-466

PETER J. BRENNAN, Secretary of Labor,
Petitioner,

v.

WALTER BACHOWSKI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF UNITED MINE WORKERS OF AMERICA AS AMICUS CURIAE

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STATEMENT OF INTEREST

The United Mine Workers of America (hereafter "UMWA") is an International labor organization with more than 200,000 members located in 23 States and 4 Provinces in Canada. The United Mine Workers of America has over the course of the past decade been subject to numerous actions brought against it under almost all of the titles of the Labor-Management Reporting and Disclosure

Act, 29 U.S.C. 401, *et seq.* (hereafter "LMRDA"). These actions were necessary because the UMWA had operated in flagrant violation of the Act from the date of its enactment until late 1972. There is no question that by enhancing democracy within the UMWA these actions were beneficial both to the Union and its members; indeed, the courts have so held, *Yablonski* v. *UMWA,* 466 F.2d 424 (C.A.D.C., 1972), *cert. denied,* 412 U.S. 918; *Hall* v. *Cole,* 412 U.S. 1, 12 (1972).

Following this Court's decision in *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972), a rank and file member of the UMWA was permitted to intervene in the Secretary's lawsuit to overturn the UMWA's 1969 election of International Officers. Thereafter, the intervenor participated in the trial of that action and in the formulation of the broad equitable decree which was entered by the District Court.[1] As a result of that decree, a rerun election was held in December 1972, and a new, reform administration was elected to the UMWA's highest offices.

Since then the UMWA has sought to become a model of union democracy. Trusteeships which had been maintained by the International Union over its District intermediate bodies have been eliminated and officers of the organization at all levels are now elected consistent with Titles III and IV of LMRDA by popular referendum vote. At the union's International Convention in December 1973, the UMWA Constitution was completely redrafted eliminating provisions which were inconsistent with LMRDA, incorporating the guarantees of the Act, and, in fact, adding democratic rights and safeguards beyond those guaranteed by the Act. Most recently, the UMWA utilized procedures established in its 1973 Constitution and submitted its new national collective bargaining agreement to the UMWA membership for a nationwide ratification vote.

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[1] *Hodgson and Trbovich* v. *UMWA,* 344 F.Supp. 17, 35 (D.D.C., 1972).

The struggle by UMWA members to overturn tyranny in their Union was a lonely and difficult one in part because of apathy and indifference, if not outright prejudice against them, by the officials within the United States Department of Labor, purportedly the guardians of union members' rights under LMRDA. Too often, union reformers have found the Department of Labor allied with union incumbents against their interests.

Because it is the belief of the UMWA that the Secretary of Labor has not, since the effective date of LMRDA in 1959, forcefully carried out the salutary legislative objective of assuring that trade unions will be free and democratic, the UMWA urges this Court to affirm the decision of the United States Court of Appeals for the Third Circuit. By holding that the Secretary's decision not to bring suit under Title IV is subject to judicial review, the Court will help assure that the Secretary becomes, as Congress intended, an effective and responsible advocate for free and democratic union elections.

In urging affirmance of the Third Circuit decision, the UMWA obviously takes no position regarding the validity of the particular election under challenge, nor does it otherwise seek to meddle in the internal affairs of another union. The UMWA's sole interest is to express its views on a narrow legal issue which has tremendous practical significance for the protection of union members' rights and the enhancement of union democracy.

ARGUMENT

I. THE DECISION BY THE SECRETARY OF LABOR NOT TO COMMENCE AN ACTION UNDER TITLE IV OF LMRDA IS REVIEWABLE UNDER THE ADMINISTRATIVE PROCEDURE ACT.

Following the establishment and proliferation of administrative agencies and bureaus under the New Deal,[2] Con-

[2] See generally, 1 Davis *Administrative Law Treatise*, §104 at 27-30 (1958).

gress in 1946 enacted the Administrative Procedure Act (hereafter "APA"), 5 U.S.C. § 551, *et seq.* In plain terms, 5 U.S.C. § 702 provides that: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Though Congress provided exceptions to an aggrieved party's right to judicial review of agency action in 5 U.S.C. § 701(a), judicial review of agency action is clearly the rule, not the exception.

The decisions of this Court uniformly establish the principle that agency action is subject to judicial review absent "clear and convincing evidence" that Congress intended to exempt such action from judicial scrutiny, *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 410 (1971); *Abbott Laboratories, Inc.* v. *Gardner,* 387 U.S. 136, 140-41 (1967). Perhaps understandably, the Secretary's brief fails to address these decisions. Congress had APA in mind when enacting LMRDA, and Title IV in particular;[3] significantly it carved out no express exception to the rule of judicial review of the Secretary's decision not to file suit under Title IV. Absent such a specific exclusion by Congress of APA review, a decision by the Secretary not to litigate is plainly reviewable by the courts.[4]

II. NON-REVIEWABILITY OF THE SECRETARY'S REFUSAL TO LITIGATE CANNOT BE IMPUTED TO CONGRESS BY ITS ENACTMENT OF LMRDA.

The cases set forth above establish a presumption of reviewability with which the Secretary never comes to grips. The entire text of the Secretary's brief is devoted to an analysis of the statutory scheme of Title IV of LMRDA as

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[3] See 29 U.S.C. §481(h) which requires the Secretary to hold a hearing in compliance with the APA to determine whether a union's constitution makes adequate provision for removal of officers.

[4] See generally, L. Jaffe, *Judicial Control of Administrative Action,* 346 (1965).

the basis for what at best would be an inference that Congress intended non-reviewability. Not once does the Secretary so much as acknowledge that private rights are at stake in Title IV proceedings, a fact which this Court clearly recognized in *Trbovich, supra* at 538-539. Indeed, virtually the identical arguments advanced by the Secretary in opposition to review of his determination not to sue were made by him in opposition to the granting of intervention and were squarely rejected by this Court in *Trbovich, supra.*

The cornerstone of the argument for non-reviewability is that a Title IV suit by the Secretary is the exclusive post-election remedy for union members dissatisfied with the results of a union election. But exclusivity of remedy militates in favor—not against—review of the Secretary's decision not to litigate. As the Secretary acknowledges, LMRDA preempted a union member's common law state court remedies to void a union election (Brief of Secretary, p. 12). Because LMRDA requires that all post-election complaints be channeled through the Secretary, it is all the more imperative that the Secretary's decision not to litigate be subject to judicial check. Even though the Secretary minimizes the impact of shabby Title IV enforcement on union members ("[t]he stake of complainants in [NLRB] cases is thus more immediate than that of a complaining member in a Title IV case . . ." (Brief for the Secretary, p. 30)), the tragic fact is that union members often stake their life savings and sometimes even their lives by seeking union office.

The Secretary's second argument is that review of the Secretary's decision not to sue would interfere with his function of screening election complaints and subject unions to frivolous litigation. There is no assertion here that Respondent sought to raise in his district court pleadings issues not previously presented within his union or before the Secretary, compare *Hodgson* v. *Local Union 6799,* 403 U.S. 333 (1971). The Respondent simply seeks to compel the

Secretary to justify his inaction on the issues Respondent has placed before him. Though it is true that a union can and perhaps should be a party defendant to such a suit, the principal responsibility for defending such an action falls on the Secretary, not the union. Any burden on the union is slight compared with that faced by the aggrieved union member in retaining counsel to challenge the Secretary's decision, to say nothing of the very substantial burden of proof upon the union member in such a proceeding.

The third argument advanced by the Secretary is that if he is required to account for his inaction, he may be subjected to multiple litigation over a single election. This is sheer sophistry. The union member who seeks judicial review must also have been the initiator of the Secretary's investigation. Therefore, it is unlikely that there could be more than one complainant regarding a single election. If there were, venue of such suits would most likely be in the same district and the cases could be consolidated in a single proceeding. Even if suits were properly brought in more than one judicial district, they could be brought before the multi-district panel and consolidated before a single judge.

Finally, the Secretary argues that if his decision is subject to review, the stautory timetable will be upset and those officers whose election has been challenged will hold office under a cloud. It is somewhat strange that the Secretary should place so much reliance upon a principle which he regularly violates. "Time" has not been "of the essence" to the Secretary and should not be recognized as any justification for non-review. In this very case—despite the statutory command that suit be filed within sixty days after the complaint is received—the Secretary and the union agreed upon an extension of sixty days of the time allowed for initiating suit. While the Secretary's practice of seeking extensions from potential union defendants has been sustained by the courts, *Hodgson* v. *Local 851, IAM,* 454 F.2d

545 (C.A. 7, 1971); *Hodgson* v. *International Printing Press & Assist. Union,* 440 F.2d 1113 (C.A. 6, 1971), *cert. denied,* 404 U.S. 878, it has been soundly criticized as disserving the interests of union members which LMRDA directs the Secretary to protect, *Local 851, IAM, supra,* 554, et seq. (Stevens, dissenting).

Not only has the Secretary been chronically guilty of delays in initiating suits, also, he has failed to prosecute them expeditiously once initiated. One of the first major issues in the enforcement of LMRDA which this Court found necessary to resolve involved the question whether the occurrence of the next regularly-scheduled union election—prior to resolution of Title IV litigation challenging the *last* election—rendered the Secretary's suit moot, *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n,* 389 U.S. 463 (1968). The Secretary talks about his concern for "resolving as quickly as possible any cloud upon office holders" (Brief of Secretary, p. 23), but his conduct speaks louder than his words. In *Trbovich, supra,* the Secretary acquiesced in the failure of the Defendant even to file a responsive pleading for more than eight months after suit was commenced. Though the case moved expeditiously after intervention was granted, judgment was not entered until two years and three months after suit was filed, and a re-run was not held until three years after the challenged election. During this entire period, the union officers who had perpetrated the fraud which led to the voiding of the election had title to their offices. Nor is the UMWA case atypical. Data for a three-year period contained in a study of the administration of LMRDA under a grant by the American Bar Foundation revealed that the average time lapse between the filing of a Title IV complaint and settlement or judgment ranged between two years and two years and six months. Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse,* 81 Yale L.J. 403, 573 (1972).

In summary, the Secretary's arguments that the stautory

scheme of Title IV should operate to preclude the protection of individual rights are without merit and should be rejected for the same reasons this Court rejected them in *Trbovich.*

III. JUDICIAL REVIEW OF THE SECRETARY'S DECISION NOT TO SUE IS ESSENTIAL TO EFFECTIVE ENFORCEMENT OF LMRDA.

Contrary to the Secretary's contention, judicial review of his refusal to file a Title IV complaint is an essential means of assuring that the Secretary will fulfill the role envisioned for him by Congress as "the union member's lawyer," *Trbovich, supra,* at 539. If the record of LMRDA enforcement by the Department of Labor were exemplary, the need for judicial oversight would be less compelling, but sadly that has not been the case.

The sorry record of enforcement of LMRDA is chronicled in more than 160 pages of the Yale Law Journal. The Yale study observed:

> The Department has adopted an administrative stance which emphasizes negotiated compliance with LMRDA requirements. The Department's procedures place far greater reliance on the internal union appeals process than on litigation and emphasize promotion of the DOL's conception of the public interest rather than enforcement of individual rights. Note, *Union Elections and the LMRDA, supra,* at 474.

Senator Robert P. Griffin, co-sponsor of LMRDA, has characterized the Department's performance as follows:

> "[O]ver the past 12 years under four administrations the Labor Department has generally been timid and reluctant to give Landrum-Griffin [the popular name for LMRDA] the vigorous implementation and strict enforcement that Congress expected." United Mine Workers' Election, 1971, Hearings before the Subcom-

mittee on Labor of the Senate Subcommittee of Labor and Public Welfare, 92d Congress, 1st Sess. (Part 2), p. 42 (1971).

Internal democracy in the context of a multi-tiered labor organization such as the UMWA depends upon compliance not only with Title IV, but with Title III, by which Congress strictly limited the conditions under which unions could impose trusteeships and thereby suspend free elections and other aspects of self-government of their subordinate bodies. While the Secretary was given a key role in the enforcement of Title III, his performance under that Title has been a public scandal.[5] Nearly all of the UMWA District organizations had been maintained in trusteeship for decades prior to the enactment of Title III and the perpetuation of those trusteeships was allowed for years thereafter. Five years after enactment of LMRDA—in December 1964—the Department finally brought suit challenging some—but not all—of the trusteeships. *Wirtz* v. *UMWA,* C.A. No. 3071-64 (D.D.C.). The suit languished on the district docket for nearly seven years, becoming one of the oldest on record before it was even brought to trial in the summer of 1971. A case involving exactly the same legal issues was privately filed by a UMWA member in mid-1971 and summary judgment entered for the plaintiff in only ten months,[6] still in advance of the decision in the Secretary's 1964 action.[7] Even though union members ultimately inter-

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[5] The point is critical here because of the intimate relation of the two Titles. In the case of the 1969 UMWA election, perpetuation of the trusteeships over the Districts was recognized as an important factor in the perversion of electoral processes at the International Union level, *Hodgson* v. *UMWA, supra,* 344 F.Supp. at 21, 30; *Hodgson* v. *UMWA,* 473 F.2d 118, 123, n.21 (C.A.D.C., 1972).

[6] *Monborne* v. *UMWA,* 342 F.Supp. 718 (W.D. Pa., 1972).

[7] *Hodgson* v. *UMWA,* 344 F.Supp. 990 (D.D.C., 1972), *aff'd* 475 F.2d 1293 (C.A.D.C., 1973).

vened in the Secretary's case over his objection[8] and prodded him to act and the UMWA's new leadership cooperated fully in quick implementation of the decree, remedial elections were not concluded until mid-1973, eight and one-half years after suit was filed.

The Secretary's own statistics demonstrate that the UMWA example is not unusual. During the first seven years following the enactment of LMRDA, 1,500 trusteeships were reported to the Secretary. In the last six years, the Secretary's annual report of Compliance, Enforcement and Reporting under LMRDA has shown the existence of between 307 and 381 trusteeships.[9] Despite the prevalence of trusteeships and the clear Congressional mandate that trusteeships be severely restricted, the Secretary has, during the fifteen years since the passage of LMRDA, filed only four Title III cases.[10]

Failure of the Secretary to pursue meritorious complaints —whether under Title III or Title IV of the Act—can only undermine any prospect that the legislative goals of LMRDA will be attained. Judicial review of the Secretary's decision not to sue under Title IV, like intervention in appropriate cases, is essential to assuring the vindication of vital private rights.

Intervention by union members in Title IV cases once

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[8] *Hodgson* v. *UMWA*, 473 F.2d 118 (C.A.D.C., 1972). In summarily reversing the denial of intervention by the District Court, the Court of Appeals noted that the case "had consumed more than seven years while three Secretaries of Labor . . . successively manned the helm" and that it "suffers by comparison with other litigation brought by union members to liquidate trusteeships which were concluded successfully in far less time." 473 F.2d at 118.

[9] *Compliance Enforcement and Reporting under LMRDA for 1967, 1968, 1969, 1970, 1971, 1972, and 1973.*

[10] *Compliance, Enforcement and Reporting under LMRDA for 1973*, p. 9.

they have been initiated insures that the Secretary will not "knuckle under"[11] to one-sided pressure from the defendant union. Without judicial review of the Secretary's decision not to sue, there cannot be any assurance that he has not "knuckled under" to similar one-sided pressure during the investigative or deliberative phase of the proceeding. The right of judicial review of the Secretary's decision not to sue is but a logical extension of the member's right to intervene once suit has been filed. Affirmance of the Third Circuit's decision is essential to insure a fair and proper administration of LMRDA.

CONCLUSION

For all the foregoing reasons, amicus curiae respectfully prays this Court to affirm the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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[11] *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Corp.*, 386 U.S. 129, 142 (1967).